

SHELTON WOODY

v.

GENERAL SERVICES ADMINISTRATION

Docket No.

SF07528110028

OPINION AND ORDER

The General Services Administration suspended appellant for thirty days for "getting a ride in a government vehicle for a personal reason", a violation of 31 U.S.C. 638a(c)(2).¹ Appellant objected to the agency's action both on the procedures followed and on the merits. The presiding official found that the agency had complied with its regulations in taking the action and that the preponderance of evidence supported the action. Therefore, he affirmed the 30-day suspension.

In his petition for review, appellant argues that the presiding official misinterpreted an agency regulation governing the timeliness of the action, and that the agency committed "harmful error." Second, he contends that the agency selectively enforced regulations governing the use of government vehicles. Finally, he asserts that the presiding official erred in finding that appellant willfully used a government vehicle for personal use and in evaluating the credibility of certain witnesses on the issue of willfulness.

Appellant has questioned the presiding official's interpretation of the agency regulation which requires the agency to place in the case file an explanatory statement for any delay in initiating an adverse action. The presiding official found that the agency statement regarding the investigation satisfied the regulation. Appellant has argued that a more detailed explanation is necessary for regulatory compliance. We do not agree with appellant's argument because the regulation only requires a reason for the delay to be stated. Here, the agency stated its reason, its lengthy investigation, and the regulation required nothing more. We do not find that appellant has established any agency procedural error.

Apart from this regulatory requirement, however, taking an adverse action against an employee based on "stale" charges is prohibited if the employee shows actual prejudice. *Heffron v. United States*, 405 F.2d 1307 (Ct. Cl. 1968); *Davis v. General Services Administration*, 5 MSPB 53 (1981); *Simmins v. Department of the Navy*, 4 MSPB 413 (1980). Appellant asserts that his presentation of evidence was prejudiced and the Board has reviewed his citation to the record in this regard. We find, though, that there is no evidence that any delay which occurred

¹31 U.S.C. 638a(c)(2) states; "any officer or employee of the Government who willfully uses or authorizes the use of any Government-owned passenger motor vehicle or aircraft leased by the Government, for other than official purposes . . . shall be suspended from duty . . . without compensation, for not less than one month. . . ."

in bringing the charges was responsible for the alleged "conflicts in testimony" or the single document which a witness could not locate, Transcript at 161-162. Further, review of the reasons offered by the agency for the delay indicates that they fail to show a lack of diligence on its part which might render the charges stale. Accordingly, the Board finds no basis for reopening the record on this ground.

Appellant's second contention has raised the issue of selective enforcement of the regulation governing the use of government vehicles. The presiding official held that appellant had not met his burden of proof on this issue. We find this allocation of the burden to be incorrect. The Board has held that where an appellant raises an allegation of disparate treatment in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld. *Douglas v. Veterans Administration*, 5 MSPB 313, 333-34, (1981). Nonetheless, under the circumstances of the case, we find no impropriety in the penalty selected. Under 31 U.S.C. 638(a)(c)(2), an employee who willfully uses an official vehicle for unofficial purposes "shall be suspended from duty . . . without compensation, for not less than one month" Since appellant received the minimum penalty authorized by law, the agency could not properly have chosen a lesser penalty. While the record is not clear as to the presence of the element of willfulness in the other cases cited by appellant, to the extent that the agency may have failed to comply with the statute in another case, we do not find this disparity a sufficient basis for violating the statutory requirement in this case.²

Finally, appellant has contended that the presiding official erred in finding "willful" misuse of a government vehicle. Basically, appellant has challenged the presiding official's credibility determinations on testimony about appellant's knowledge of the regulation and procedures prohibiting the personal use of government vehicles.

Each party cited the case of *Keane v. Berry*, Civ. No. 75-493 (D. Ariz., filed January 3, 1978), for a definition of the term, "willfully", used in 31 U.S.C. 638(a)(c)(2). This case held that stated liability was to be imposed if the employee "voluntarily and consciously . . . used a government car with knowledge or reckless disregard of whether the use was for other than official purposes." *Id.*, at 5. Appellant has maintained that he did not know that his use of the motor vehicle was against the regulation. Specifically, he challenges the presiding official's credibility evaluation of certain witnesses, whose testimony established that appellant did know that his personal use of the car was not permitted.

²We need not reach the issue of whether arbitrary enforcement of a statute violates the principle of like penalties for like offenses. See *Douglas v. Veterans Administration*, 5 MSPB 313 (1981) & Exec. Order 7830 § 01.2(d), 3 C.F.R. 608 (1943-48 Comp.). In this case the agency adequately rebutted the allegation of selective enforcement by showing the alleged inconsistencies to be distinguishable from this case.

In *Weaver v. Department of the Navy*, 2 MSPB 297 (1980), the Board stated that due deference had to be given the presiding official's assessment of witness credibility since he was present to hear and to observe the demeanor of witnesses. *Id.*, 299. Thus, a petition for review must contain "some specification of evidence or reasons warranting a review of the presiding official's credibility finding." *Id.* Here, appellant has merely asserted his disagreement with the findings, which appear well supported by the evidence, but he has not shown any error in the findings. Therefore, we find no basis for reviewing this determination.

Further, appellant has alleged that there was no agency practice requiring duty officers to report requests for vehicle use to Captain Lopez as the Captain testified, or that, if there was such a practice, it was not known by the subordinates. He has offered affidavits to support his contention and given as his reason for not presenting the evidence earlier that he did not know until the testimony of certain witnesses that there would be a need. We find no basis for reopening on this ground. First, the information proffered is not directly relevant to the major issue in the case. *Zidele v. Defense Contract Administration Services Region*, 3 MSPB 448 (1980); *Leonard v. U.S. Postal Service*, 3 MSPB 251 (1980). Further, two of the affiants testified at the hearing and the record was held open thereafter for the submission of closing briefs. The submission, therefore, has not been shown to have been previously unavailable with the exercise of due diligence. See *Rose v. Department of the Navy*, 3 MSPB 500 (1980). Accordingly, it fails to meet the requirements of 5 C.F.R. 1201.115(a).

The Board, having fully considered the appellant's petition for review of the initial decision, finds that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., June 2, 1981